UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIRST AMERICAN ENTERPRISES d/b/a HERITAGE LAKESIDE		
and	**Case Nos.**	**18-CA-211284**
		18-CA-212666
UNITED FOOD AND COMMERICAL		**18-CA-216776**
WORKERS UNION LOCAL 1189		**18-RC-212417**

Rachel M. Simon-Miller and Florence Brammer, Esqs.
for the General Counsel.
Robert S. Driscoll and Christopher Schuele, Esqs.
(Reinhart Boerner Van Deuren, S.C), Milwaukee, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Rice Lake, Wisconsin on December 12, 2018. UFCW Local 1189 filed the charges in this matter on December 7, 2017, January 8, 2018 and March 19, 2018. The General Counsel issued the consolidated complaint on June 27, 2018, and consolidated Case 18-RC-212417 with the unfair labor practice cases for hearing.

Prior to July 2017, First American Enterprises operated 2 nursing homes in the Rice Lake, Wisconsin vicinity.[1] The Union represented the cooks, dietary aides, activity aides, housekeeping personnel and certified nursing assistants at one these, Heritage Lakeside, formerly known as the Rice Lake Convalescent Center. The other facility, Heritage Manor, was not unionized.

[1] In December 2018 Health Dimensions Group managed Heritage Lakeside. First American was only a conservator.

Between July and October 2017, First American consolidated the nursing homes, moving most of the patients and employees from Heritage Manor to Heritage Lakeside. It closed Heritage Manor. On December 4, 2017, Respondent withdrew recognition from the Union, stating that 47 of the its then bargaining unit employees had come from Heritage Manor and only 23 were from the unionized Heritage Lakeside home.

On January 2, 2018, Local 1189 filed a representation petition. A Board election was conducted on February 1, 2018. The ballots were impounded until March 8. The tally conducted on that date established that 25 votes were cast for the Union and 25 votes against it. On March 15, the Union filed objections to conduct affecting the results of the election. The Regional Director ordered a hearing on union objections 1 (Respondent forced employees to sign a new policy prohibiting discussion of the Union in the workplace) and 3 (unlawful interrogation and instructing employees to vote if they intended to vote against union representation). These objections mirror complaint paragraphs 5(c)-5(h).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

First American, a Minnesota corporation, operated Heritage Lakeside, a long-term care facility in Rice Lake, Wisconsin. Heritage Lakeside is now managed by another business entity.[2] Heritage Lakeside annually derives revenues in excess of $100,000. Heritage Lakeside purchases and receives goods valued in excess of $50,000 directly from points outside of Wisconsin. Heritage Lakeside admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint paragraph 5(a) and (b), August 2017 alleged interrogation and threats

The test as to whether an employer's statement or conduct violates Section 8(a)(1) is whether it may reasonably be said that the conduct or statement tends to interfere with employee rights under the Act. The employer's motive in making the statement or engaging in the conduct is irrelevant to whether it violated Section 8(a)(1), *American Freightways Co., Inc.,* 124 NLRB 146, 147 (1959).

[2] By Respondent, I mean Heritage Lakeside, regardless of who owned that facility.

Darla Buesser, a current employee and activity aide, was one of 2 union stewards at Heritage Lakeside. In August 2017, Buesser approached Carolyn Hafele, a dietary aide, and urged her to sign an application for union membership.[3] Buesser told Hafele that the Union was the only thing that would save her job when Heritage Manor and Heritage Lakeside merged. Buesser warned Hafele that employees transferring from Heritage Manor had greater seniority than Hafele and that as a result, Hafele might lose her job without the Union.

Hafale was concerned about losing her job in the merger, but it is unclear whether she had communicated this to Buesser. Hafele filled out the application, which included authorization for Respondent to deduct union dues from her paycheck She gave the completed application to Buesser who turned it in to Respondent's business manager, Jackie Damaske-Frame.

Afterwards, Sarah Noggler, then Hafale's supervisor, told Hafale that she did not need to join the Union and that Hafale should have talked to Noggler before joining. Hafale then went to Jackie Damaske-Frame and asked if it was too late to stop the dues deduction.

Two days later, Respondent's administrator, Derek Joswiak, called Hafale into his office. He told her that Noggler and Jackie Damaske-Frame should not have been talking to her about joining the Union. He said he would have to get back to her about the dues cancellation. Hafale told Joswiak that Buesser had told her that only the Union could save her job. Joswiak told Hafale she had nothing to worry about. There is no credible evidence that Hafale told anyone that Buesser told her she would be fired if she did not join the Union.

About a week later, Joswiak approached Buesser and took her into an empty room. Joswiak told Buesser that Hafale had told him that Buesser had told Hafale that she would be fired if she did not join the Union. Buesser denied this. Joswiak told Buesser that he believed her. Joswiak also told Buesser that he had spoken to his boss, Eric Everson, and that Everson also did not believe that Buesser had told Hafale that she would be fired if she did not join the Union.[4] Joswiak asked Buesser to keep their conversation confidential.

A week later, Buesser met with Joswiak, Everson and Carolyn Hafale. Either Joswiak or Everson or both asked Hafale if she still wanted to belong to the Union; Hafale said that she did and would leave her union application alone.

The lead Board case regarding the legality of interrogations is *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

> [I]t is [well established] that interrogations of employees are not per se unlawful but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

[3] Hafale voluntarily left Respondent's employ in March 2018.

[4] There is no evidence as to how Buesser's conversation with Hafele came to Erickson's attention.

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital,* 338 NLRB 320, 320-321 (2002).

I find the violation alleged in complaint paragraph 5(a) (i), but not the allegations in 5(a)(ii) and 5(b). There is no evidence that Carolyn Hafele told Administrator Derek Joswiak that Darla Buesser told her that she would be fired if she did not join the Union. Thus, I find that it was highly coercive for Joswiak to summon Buesser into an empty room by herself and pass that accusation along to Buesser. It was also highly coercive for Joswiak to tell Buesser that he had discussed this unfounded allegation with his boss, Erik Everson. Regardless of the fact that Joswiak told Buesser that he believed her denial and that Everson also gave no credence to the allegation, this conversation would necessarily inhibit Buesser from advocating union membership to fellow employees. Thus, I find that Respondent, by Joswiak, violated Section 8(a)(1) in this conversation with Buesser.

However, I do not find that Joswiak violated the Act by telling Buesser to keep their conversation confidential. He had not disciplined Buesser which distinguishes this case from those cited by the General Counsel.

I also find that Respondent did not violate the Act in asking Hafele whether she still wanted to be a union member. Hafele had asked Respondent not to deduct union dues. It was reasonable and not coercive for Joswiak under the circumstances to ask Hafele what she wanted him to do about the dues deduction.

Complaint paragraph 5(c) & (d) & (f)(i) and (ii)

Kayla Anderson was employed as a dietary aide and cook at Heritage Manor from about July 2014 until August 2017, when she was transferred to Heritage Lakeside. She quit her employment voluntarily in October 2018. Several times after the representation petition was filed on January 2, 2018, Dietary Manager Melissa Kern came into the home's kitchen and told employees that Respondent needed them to vote against union representation. Anderson told Kern that she had taken off for February 1, did not really care about the outcome of the election and did not want to come into work. Kern pressed Anderson about coming to work to vote on February 1 to the point that Anderson thought Kern was threatening her job.

Carolyn Hafele testified that in early January, Kern asked Anderson and Lilly Swanson how they planned to vote and that Kern asked 2 other employees on election day how they voted. Hafele also testified that Kern immediately recorded this in a notebook she was carrying. Kern denies this. Both Anderson and Swanson testified and neither stated that Kern asked them how they planned to vote. On account of this, I decline to credit Hafele and decline to find that Kern asked any employees how they planned to vote or how they voted.[5] I dismiss all allegations regarding interrogations by Kern or surveillance of union activities by Kern.

[5] The two other employees, high school students who apparently worked part-time, did not testify. Due to the lack of corroboration of Hafele's testimony by Anderson and Swanson, I also decline to credit her testimony regarding Kern's alleged inquiries to the 2 high school students.

Complaint paragraph 5(e,), (g) and (h): implementation of new policy prohibiting other than "resident-centered" conversations in working areas and accompanying threats.

On January 7, 2018, Certified Nursing Assistant (CNA) LeeAnn Stevens and Darla Buesser had a brief conversation near a nurse's station. They discussed the need to make all employees aware of an upcoming union meeting. Patti Urmanski, a charge nurse, was nearby when this conversation occurred.[6]

The next day, January 8, 2018, Kristina Taylor, Respondent's Director of Nursing (DON), required employees to attend a brief meeting. At this meeting she told them that she did not want to hear any talk in the facility unless it was resident-related. Taylor then required the employees to sign a QCM Form stating, "The only conversation that needs to be heard/discussed on the floor, in resident's rooms, dining rooms is resident-centered. Any other topics are not appropriate and can be discussed on your breaks or your own time." Approximately 50 of the approximately 70 unit employees were required to sign a QCM Form either by Taylor or other managers, G.C. Exhs. 4(a)-4(e).

There is no evidence that any Heritage Lakeside employee was aware of the "resident-centered conversation" rule prior to January 8, 2018. LeeAnn Stevens, Carolyn Hafele and Amber Morgan credibly testified that they had never seen such a written rule, were unaware of any company policy regarding what could be discussed at the nurses' station or, of such a rule being enforced previously.

Respondent was strongly opposed to having the Union represent Heritage Lakeside employees. In January 2018, it posted a flyer that said as much, G.C. Exh. 3. Respondent also held 3 mandatory meetings for employees in which it encouraged them to vote against union representation. For these reasons I conclude that the new conversation rule was precipitated by the upcoming union election, not any inappropriate conversations amongst nurses in front of residents. As such I find that this change in policy was a violation of Section 8(a)(1), *Dayton Hudson,* 316 NLRB 477 (1995) at 478 and 486, *Nashville Plastic Products,* 313 NLRB 462 (1993). Even if I were credit DON Taylor that this rule or policy predated the filing of the representation petition, it is apparent that the rule was widely disseminated to employees for the first time and enforced only after the filing of the representation petition of January 2. Therefore, the rule was established and/or broadly disseminated and/or enforced for the purpose of interfering and restraining employees in the exercise of their Section 7 rights. As alleged in

[6] While it is unclear as to whether Respondent's awareness of the Stevens-Buesser conversation precipitated the new rule discussed herein, I infer its promulgation was related to the union organizing drive and the upcoming election. I specifically discredit the testimony of Director of Nursing Kristina Taylor that the rule dissemination was precipitated by her learning that 2 CNAs were discussing their boyfriends in front of a resident. If that were the case there would be no need to have the entire nursing staff acknowledge the rule in writing and no need for a rule that was so broadly worded. Moreover, Taylor did not mention this "inappropriate" conversation to employees when meeting with them the next day. The fact that Respondent did not offer employees any explanation for the promulgation of this rule or its timing, a week after the representation petition was filed, gives rise to an inference that promulgation was unlawful and intended to interfere with employees' Section 7 rights, *Shore and Ocean Services,* 307 NLRB 1051 (1992).

complaint paragraph 5(g) and (h), promulgation of the rule therefore violated Section 8(a)(1) of the Act,

In addition, Taylor's statements to employees when promulgating or disseminating the rule violated the Act as alleged in complaint paragraph 5(e) per the long-standing principles enunciated in *American Freightways*. By requiring the majority of the bargaining unit to sign the QCM form, and her verbal statements, Taylor was strongly suggesting that disciplinary action would be taken if employees violated the newly disseminated and illegal rule.

The illegality of the rule and Taylor's statements are not in any way negated by the admission of former employee Kayla Anderson that she was aware that having inappropriate conversations in front of residents was part of an employee's role as a health care provider. That a nurse might understand that he or she should not talk about the employee's sex life or the resident's medical condition in front of the patient does not mean that an employee could not talk about wages, hours and working conditions (including the desirability or not of union membership) in front of residents so long as it did not interfere with the quality of care rendered.

The promulgation of Respondent's "resident-centered" conversation rule, in of itself, warrants ordering a new election.

The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period. However, the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether the misconduct could have affected the election result, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors, *Clark Equipment Co.,* 278 NLRB 498, 505 (1986).

In this instant case, there are many factors supporting an order for a second election: the timing of the unfair labor practice, starting a little more than 3 weeks before the election and continuing throughout the critical period; the closeness of the election result (25-25); the dissemination of Respondent's illegal policy to about 70% of the bargaining unit; and the identity of the officials committing the violation, i.e., the director of nursing and the dietary department manager.

Complaint paragraph 5(f) (iii)

Melissa Kern told Lily Swanson and Carolyn Hafele that if they voted for the Union, they were saying that she was a bad boss. Kern testified that she told a group of employees that if she was a fair boss, there was no need for a union. The General Counsel alleges that Kern's remark to Hafele, Swanson and others is an illegal threat that a vote for the Union is incompatible with having a good relationship with their supervisor. I do not find any precedential support for the proposition that Kern's statements violate Section 8(a)(1). Therefore, I dismiss complaint paragraph 5(f)(iii).

Complaint paragraph 5(i)

Respondent's employee handbook contains the following rule:

> Rice Lake Convalescent Center has various types of confidential business information which must be protected. Such confidential information includes, but is not limited to, the following examples…All personnel file information, employee names, addresses, home phone numbers, salary or wage information, medical data and any other information about our employees.

The legality of Respondent's confidentiality rule is governed by the Board's recent decision in *The Boeing Company,* 365 NLRB No. 154 (2017). In *Boeing,* the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rule is not an issue in this case.

DON Kristina Taylor testified that the rule is intended to insure that the business office not divulge personal information. I do not find that explanation credible because if that was Respondent's concern, it would not have put the rule in a handbook applicable to all employees. Moreover, it never informed employees that the rule was applicable only to office personnel. Finally, the rule is not limited to personnel file information, it prohibits disclosure of "any other information about our employees."

Respondent argues in its brief at page 7 that no employee would reasonably interpret this rule to prohibit discussion of wages. It contends that since employees would not conclude that it violated the rule to tell each other their names or phone numbers, they would not reasonably believe they were prohibited from discussing wages. I find this argument unpersuasive. The likely understanding of this rule would be that employees are not to discuss their wages or other employees' wages regardless of whether they are free to exchange names, addresses and phone numbers. Finally, Respondent has no legitimate business justification to prohibit employees from discussing salary or wage information, thus the rule, as written, violates Section 8(a)(1).

Alleged illegal threats to employees that Respondent needed them to vote against union representation (complaint paragraph 5(d) and 5(f)

As a general rule, an employer does not violate the Act by encouraging employees to vote against union representation, or seeking the help of employees to convince others to vote against union representation. The Board has on at least on one occasion found such encouragement or solicitation of "no" votes to violate the Act in the context of other unfair labor practices, *Modern*

Manufacturing Company, 261 NLRB 534-35 (1982). I see no reason to depart from the general rule in this case and therefore dismiss complaint paragraphs 5(d) and 5(f) insofar as they allege that such solicitation for "no" votes was illegal.[7]

Summary of Conclusions of Law

I find that Respondent violated the Act in the following respects and no others:

On August 17, 2017, Respondent, by Administrator Derek Joswiak, violated Section 8(a)(1) by interrogating Darla Buesser about a union-related a conversation with Carolyn Hafele.

On or about January 8, 2018, Respondent, by Director of Nursing, Kristina Taylor, violated Section 8(a)(1) by threatening employees not to engage in union activity.

On January 8, Respondent violated Section 8(a)(1) by promulgating, or for the first time, disseminating and/or enforcing a rule forbidding conversations in work areas other than those that are "resident-centered."

Respondent's "Non-disclosure" policy in its Employee Handbook violates Section 8(a)(1) in so far as it prohibits employees from discussing salary or wage information.

Recommendations Regarding Objections

I recommend that the election be set aside and remanded to the Regional Director for the purpose of conducting a second election since the Respondent committed a significant unfair labor practice during the critical period. By this I mean its promulgation, dissemination and enforcement of the "resident-centered" conversation rule. Additionally, during the critical period, Respondent impliedly threatened employees with discipline if they violated this rule.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[7] Thus, while I credit Carolyn Hafele's testimony that Melissa Kern tried to get her assistance in convincing Lily Swanson to vote "no," I find this did not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Heritage Lakeside, Rice Lake Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) impliedly threatening employees with discipline if they engage in union or otherwise protected discussions in work areas.

(b) promulgating and/or disseminating and/or enforcing a rule in reaction to a union organizing campaign that forbids union or other protected conversations in work areas.

(c) interrogating employees as to their conversations soliciting support from other employees for the Union.

(d) maintaining a rule in its employee handbook that can reasonably be read to prohibit employees from discussing salary and wage information.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting any conversations in work areas that are not "resident-centered."

(b) Rescind or revise its employee handbook rule to clarify that employees are not prohibited from discussing salary and wage information with each other—unless that information had been obtained as a result of their access to official personnel files.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its Rice Lake, Wisconsin facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 7, 2019

Arthur J. Amchan
Administrative Law Judge

9 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT impliedly threaten employees with discipline if they engage in conversations that are not "resident-centered" in work areas.

WE WILL NOT interrogate employees about their conversations in which they seek to encourage other employees to support United Food and Commercial Workers Local 1189 or any other union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, rescind our rule forbidding conversations in work areas that are not "resident-centered."

WE WILL, rescind or revise our employee handbook so as to make clear that employees are allowed to discuss salary and wage information unless they have acquired such information from their access to other employees' personnel files.

FIRST AMERICAN ENTERPRISES d/b/a HERITAGE LAKESIDE

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-211284 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 930-7203.